8th Agenda

1(19)

INSOLVENCY LAW REVIEW COMMITTEE

EIGHTH MEETING

Meeting to be held in the Conference Room,
2-14 Bunhill Row on Friday, 23 September 1977
at 10.00 a.m.

AGENDA

1. Minutes of the meeting on 25 August
2. Matters arising
3. Secretary's report
4. Enforcement Procedures - discussion of Committee's ambit
* 5. Deeds of Arrangement
* 6. Administration Orders (ILRC 31)
7. Voluntary Winding Up (continued) (ILRC 13)
8. Compulsory Winding Up (ILRC 12 and 30)
9. Bankruptcy (ILRC 33)
10 Any other business
11 Agenda for the next meeting
12 Confirm date of next meeting
(Monday, 17 October)

* subject to additional working papers being ready.

E L REEVES
Assistant Secretary
2 September 1977

8th Mtg'
23.9.77

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INSOLVENCY LAW REVIEW

Minutes of the Eighth Meeting of the
Review Committee on
23 September, 1977.

Present:

K R Cork (Chairman)
J S Copp
A I F Goldman
J M Hunter
D McNab
P J Millett
T R Penny
E A Walker-Arnott
T H Traylor (Secretary)
E L Reeves (Assistant Secretary)

In Attendance:

D Graham
A J Sim
G A Weiss

1. The Committee met at 10.00 a.m. The minutes of the seventh meeting held on 25 August 1977 were agreed and signed by the Chairman.

MATTERS ARISING

2. Mr Goldman referred to para 2 of the minutes of the seventh meeting at which he had not been present and said that he was sad to see that there was a lack of staff in the secretariat; he asked if there was anything further to report. The Secretary said that it had not yet been possible to start on any of the matters referred to in paragraphs 5, 8 and 9 of the minutes of the meeting held on 28 July, and that existing work was now falling behind. In addition, the Accountants' Panel were nearing the end of their investigation of Receiverships and after the next meeting on 3 October, would be looking to the Secretary to draft their report; this would be followed by the preparation of the Legal Panel's reports on "Romalpa" and on "Procedures in overseas countries".

3. During the ensuing discussion a number of members said that the strength of the existing staff was quite inadequate. The Chairman said that the staff should be increased to cope with the Panels and it should be realised that by using Panels, the Committee's task would probably be completed in half the time; therefore there would not be an increase in overall staff man-hours.

4. The Secretary was instructed to discuss the matter with the Inspector General and to report back to the Chairman if possible before 30 September.

5. Mr McNab asked when the Legal Panel would report on Romalpa (para 4 of the minutes). The Secretary replied that the Panel would be discussing 'Romalpa' at their next meeting on 26 October. Mr Millett said that he would prepare a paper for circulation to the Committee and the Legal Panel before their next meeting; he hoped that the conclusions reached so far were only provisional. The Chairman said that the only conclusion reached so far was that the Committee was concerned only with Romalpa in insolvency. Mr Millett added that he hoped that the Committee was aware that both the Law Reform Committee of the Bar Council and the Law Commission had in fact pushed consideration of Romalpa onto the Committee and he hoped that the Committee were not going to take too narrow a view of their terms of reference. Mr McNab did not think that the Committee could confine themselves to discussion of Romalpa in insolvency. Mr Goldman suggested that Mr Walker-Arnott should also prepare a paper, setting out his views on the subject and this was agreed. The Secretary said that after the earlier suggestion that there should be central registration he had written to the Registrar of Companies. The Registrar thought that would not be easy and had given his views as to why he thought Romalpa was not comparable with registration of mortgages and legal charges. He would circulate this to the Legal Panel. The Chairman added that in this case he expected the Legal Panel to consider the practicalities of the Committee's provisional conclusions.

6. The Secretary said that Mr Avis had written that he was not too happy that it should be left to members of the Committee to draw attention to anything in the comments from consultees which ought to be looked at, as this could lead to duplication of work or failure to take account of what might be important aspects. He would also like to see an index of consultees' papers under section headings. Mr McNab said that he felt that the Committee should go through each submission and decide whether or not they agreed with the points made. The Chairman said that he did not feel that the Committee would have time to go through each submission. If any member thought there was a matter which should be discussed he should bring it up. The secretariat would put a summary on each consultee's submission before it was circulated, and would also be preparing working papers which grouped the evidence from consultees under subject headings. When a particular subject was being dealt with by the Committee, the appropriate ILRC paper giving the consultee's views would be brought up and considered.

7. The Secretary referred to para 19 of the minutes concerning papers to be prepared by members; a paper had been received from Mr Muir Hunter on "Majority rule by creditors in insolvency" and had been circulated as ILRC 41. Mr Penny said that his paper on a new form of Administration Order procedure should be ready for the next meeting. Mr Graham said that he hoped shortly to produce some outline notes on Deeds for consideration by Mr Weiss.

SECRETARY'S REPORT

8. The Secretary reported as follows:

(a) Mr Avis, Mr Drain, Mr Muir Hunter, Mr Taylor and Mr Endersby had sent apologies for absence,

(b) Papers circulated since the last meeting were:

(i) ILRC 35-41

(ii) an extract from the proceedings of Standing Committee C on enforcement procedures, and

(iii) an article on Administration Orders by Alec Samuels.

(c) An extract from "Trade and Industry" of 5 August on "Insolvencies in England and Wales Second quarter 1977" had been put before the Committee at the present meeting.

9. Mr Graham referred to the extract on enforcement procedures and said that there had been a long debate in the Standing Committee on the whole subject and in particular, the ineffectiveness of administration orders as an alternative to bankruptcy. The Secretary said that the whole debate could be produced if required.

REPORT BY CHAIRMAN

10. The Chairman reported that he had had a visit from Mr Derek Griffiths who had grievances regarding his company which had been put into receivership and the assets hived down. Although the Committee would not discuss grievances, he proposed that this particular case should be looked at, when the Committee was dealing with compulsory liquidation. One of the reasons for having compulsory liquidation was so that the Official Receiver could investigate the company concerned, but he felt that this did not always work adequately in practice where there were no assets in the liquidation. The Committee would be looking at a situation where people want the matter to be dealt with by the Courts rather than by voluntary methods.

ENFORCEMENT PROCEDURES

11. The Committee had before it:

(a) a note on enforcement procedures, together with an extract from the proceedings of Standing Committee 'C' during the passage of the 1976 Insolvency Bill (as the note recorded, consultees had been invited to give views on existing procedures and many had done so),

(b) ILRC 37 (comments from consultees) and

(c) a note from Mr Muir Hunter setting out his observations.

12. There was considerable discussion about the extent to which consideration of enforcement procedures should be within the Committee's remit and the following points were made:

(a) the Minister's statement in Standing Committee appeared to have been made in the context of an internal review, not the Cork Committee;

(b) the Payne Committee had made a full and detailed report in February 1969; many of the current complaints had been considered by Payne but their recommendations had not yet been implemented;

(c) enforcement procedures were the responsibility of the Lord Chancellor's Department and perhaps the evidence should be referred to them;

(d) if it was referred to the Lord Chancellor or the Committee was not dealing with the subject, the consultees should be told;

(e) there was a view that to employ a bankruptcy or winding up petition in order to enforce payment of a debt was a misuse of a petition;

(f) on the other hand, often, the only way of being likely to collect a debt was by the issue of a bankruptcy petition;

(g) bankruptcy is an enforcement procedure and if the view is taken that the others are inadequate, the Committee must be careful not to reduce the efficiency of the remaining useful one;

(h) the Committee should not be inhibited in making recommendations on insolvency because they think this is the only, or best, way of collecting debts;

(i) the problems are with the County Court and not with the High Court; in devising a scheme for mini-bankruptcy, it would be necessary to decide what enforcement powers are provided and this might solve present problems; and

(j) the Committee was concerned more with collective measures, but setting these in motion could inhibit the rights of individual creditors to pursue enforcement by charging orders, etc.

By a majority, the Committee agreed that the Chairman should write to the Minister, referring to the statement in Standing Committee, saying that there was considerable evidence that enforcement procedures were not adequate and that bankruptcy was being increasingly used as an enforcement procedure; that if the Committee decided to make proposals which might reduce the efficiency of bankruptcy as an enforcement procedure, this would point to a requirement for improving other methods of enforcement; was it the Minister's wish that the matter should be left to the Lord Chancellor or did he want the Committee to deal with it. The letter should make it clear that the majority of the Committee felt that

it was too much to include in their remit and enclosed with the letter should be a summary of the evidence received from consultees under complaint headings. The Chairman suggested that if the Committee did have to deal with the matter, it should be at the end of their deliberations.

13. Mr John Hunter suggested that it would be necessary to look at Charging Orders and in particular the Law Commission Report presented in 1976 /Cmnd 6412/. The Chairman agreed.

DEEDS OF ARRANGEMENT

14. The Committee had before them ILRC 38 (Comments from consultees) and ILRC 41 (a paper by Mr Muir Hunter on majority rule by creditors). The Secretary said that there were still some papers to come on this subject and it was suggested that it might be preferable if 'Deeds' was deferred to the next meeting. However, the Committee decided to have a brief discussion on the subject.

15. In reply to a request for guidelines, the Chairman said that he thought that the Committee had accepted, in principle, that no-one should be made bankrupt unless he had done some evil to the community and that in other cases, insolvency should do the least harm possible to the community. This meant getting the creditors back as much as possible as quickly as possible, not destroying any business which was of value to the community and not creating unemployment unless it was absolutely necessary. The Deed provided an immediate moratorium on the business; it became a new business so far as creditors were concerned and the trustee could sell it as a going concern. The snags were that creditors would not accept it as it could be used as an act of bankruptcy and the trustee did not have the same power of collecting past assets as he did in bankruptcy. What the Committee had in mind was that it should not be an act of bankruptcy and the trustee should be given the same powers as in bankruptcy. He would have power to apply to the Court to have it changed into a bankruptcy if during the course of his investigation it was found to be necessary.

16. Mr Millett questioned the need for three categories of administration (para 18 of the minutes of the seventh meeting) and thought that it might be possible to assimilate Deeds and Administration Orders but it was suggested that the Deed would not be able to deal with the debtor with no assets.

17. A lengthy discussion followed during which the following points were made:-

(a) If we have a Deed, it would be necessary to be sure that the scheme is run with such integrity that it is right to bind dissentient creditors and while negotiations are taking place, prevent them from starting proceedings against the debtor or harassing him with other enforcement measures;

(b) it might be necessary to apply to the Court for a stay of proceeding in respect of all executions;

(c) the size of the liabilities was more important than the size of the assets,

(d) the Deed at present does not cover after-acquired property whereas the Administration Order deals with after-acquired income - this would lead to problems of harmonisation,

(e) bringing in after-acquired property would prevent or delay the debtor's rehabilitation,

(f) various suggestions were made for dealing with after-acquired property such as that it should only apply for a period of 12 months or that it should only be brought in with the approval of the Court, or in the case of changed circumstances which had not been envisaged (eg. the debtor winning a large sum and refusing to make it available) that there should be provision for the Deed to be set aside and changed to bankruptcy,

(g) with after-acquired property there would be the problem of the new creditor and how he should be told, and

(h) there was also the question of publicity and advertisement; a trustee who does not advertise for claims might not get a complete release under the Trustee Act.

18. ILRC 38 was referred to and the Chairman said that it was clear that consultees were in support of Deeds and thinking along the lines of the Committee, that it should not be an act of bankruptcy or prevented by a persistent creditor; these comments however would be considered further when the Committee had before it the paper on the proposed new form of Deed. Mr Weiss added that the last paragraph of the paper would say what had not been adopted and why the suggestions had not been adopted. Mr Millett suggested that when the paper was produced the possible assimilation with Administration Orders should be borne in mind.

19. Mr Sim said that he was preparing a paper on the Scots Trust Deed for Creditors, this was an informal procedure rather akin to Deeds but more flexible. It suffered from the same potential defects but in practice, these did not appear to occur. It was generally known that Trust Deeds were used to a greater extent than formal bankruptcies. He would also provide comments by consultees.

ADMINISTRATION ORDERS

20. Mr Penny referred to ILRC 31 and explained that the existing Administration Order procedure has to start with a judgement and was a straightforward debt-collecting procedure from income. When the debtor applies for an Order, he provides a list of debts; the creditors are given notice and if they do not object the Court makes an Order as to payment each week or each month. When the money comes in periodically it is distributed pro-rata to the listed creditors (who need not be judgment creditors). There are no preferential payments, there is no question of going into assets and there is no publication or advertisement. There were problems over HP debts and most Registrars felt that anybody with any form of security should be excluded. What he had in mind for the new form of Administration Order was that the Court should take a more active part in seeing that the debtor pays, and should deal with the assets in the simplest possible way. In more complicated cases where there were disputes over the ownership of property, gifts etc., he felt

that these cases should go into bankruptcy. The Chairman suggested however that this was against the Committee's line of thought, where the small man should not have the full rigours of bankruptcy; a way would have to be found of dealing with it.

21. Mr Penny went on to say that if the Court was to be responsible for administration, a larger organisation would be needed. The Secretary referred to the recommendation of the Payne Committee (supported by consultees) that Enforcement Offices separate from the County Court should be set up. Mr John Hunter said that Northern Ireland had been operating an Enforcement Office system since 1970 but there were grave problems, widespread criticism and enormous cost. It was suggested that simple cases (the wage earner without assets) might be dealt with by a Court official and that the Official Receiver might handle the more complicated cases. In cases where it was suspected that there might be assets, the Registrar should have the option of either making the debtor bankrupt or appointing the Official Receiver as trustee. Mr Goldman said that in devising the new procedure regard would have to be made to the bounds of practicability and expense.

21. The Chairman said it would be preferable if the Deed and the Administration Order followed the same procedure as far as possible; under an Administration Order, the Court should appoint either a member of the Court's staff or the Official Receiver to act as administrator. He invited Mr Penny to think further about the problem and to produce another paper.

VOLUNTARY WINDING UP

23. The Secretary recalled that at the previous meeting there had been a general discussion (paras 21 to 28 of the minutes). The Committee decided to consider the matters set out in para 20 of ILRC 13.

24. Item (a) was found acceptable.

25. The Committee agreed with item (b) but thought "liquidator" should not be used - "administrator" would be better; but it might be that the appointment should be with the sanction of the Court.

26. There was a lengthy discussion on item (c)of para 20. The Chairman summarised the situation: the three possibilities were -

(i) the date of the resolution to wind up the company by the directors,

(ii) the actual arrival of the administrator; and

(iii) the winding up resolution as passed by the company in general meeting.

Possibly one could add the date when it was clearly certified by someone that the company was insolvent. He thought (i) or (ii) were the simples choices. A snag was that the directors' resolution might not be passed by the company.

27. During the discussion the following points were made:-

(a) it was necessary to have certainty as to the date,

(b) the Jenkins' recommendation (date of delivery to the Registrar of Companies of the directors' declaration that meetings were to be summoned) was too uncertain;

(c) it was not possible to have things happening on a date which was not definable at the time,

(d) the nearest date to "cessation of payments" would be the date on which the directors resolved the company was insolvent.

(e) using the date of petition in the case of compulsory winding-ups was on grounds of certainty only and was probably the only practical way, and

(f) it would be necessary to protect the interests of the general body of creditors from acts prejudicial to them during the period when the company was thought to be insolvent, while at the same time permitting ordinary commercial transactions.

It was provisionally agreed that the date should be the date of resolution by the directors and that this must be stated in the notice calling the meeting. It was suggested that it might be necessary to provide that if no date was stated, it should be deemd to be the date on which the notice was sent out.

28. On item (d) of para 20 the Chairman said that there was a very good chance of making the new kind of receiver almost exactly the same kind of person as this administrator; it was agreed that consideration of this item should be deferred until the Accountants' Panel had reported on the powers and duties of the receiver and manager.

29. With regard to item(e) it was thought that this could be left to a panel to work out.

30.. On item (f), it was thought that no one would comply and that the Committee should leave things as they are.

31. On item (g), the Chairman suggested that there might be agreement in principle but the Committee should look again later to see whether friendly societies should be wound up voluntarily.

32. On item (h), the Secretary referred to the reasons given in para 13 of ILRC 13 and said that the Association of British Chambers of Commerce had now put the proposal forward on different grounds. There have been cases where companies wished to enter members' voluntary liquidation as they were solvent but owing to technicalities (failing to provide a declaration of solvency within the specified period) the company was put into creditors' voluntary liquidation. It was expensive to apply to the Court to rectify the situation. Mr Millett suggested that this could be rectified by the requirement being amended. It was felt that the proposal could be effected on the declaration of the liquidator or on the application to the Court by an interested party.

33. Item (i) was seen to be an anomaly and the Law Society's proposal was provisionally accepted.

34. Item (j) was agreed, but it was thought that it might not be within the Committee's remit as it dealt with the winding-up of solvent companies.

35. Item (j) also referred to the declaration of solvency. The Chairman thought the first part of the Scottish Law Commission's proposal was acceptable but that "the latest practicable date" should be left unchanged. The Committee did not dissent.

OTHER BUSINESS

36. Mr Goldman said that the written evidence submitted by consultees included matters which affected the Rules. He was proposing to ask the Rules Committee to write to the Secretary, asking if they could have copies of such evidence. The Chairman indicated that this would be acceptable.

37. Mr Weiss enquired about further remits for the Accountants' Panel and the Chairman suggested that after they had concluded their work on Receiverships they might start to look at anomalies in the present Acts.

FUTURE MEETINGS

38. It was agreed that the next meeting would be held on Monday 17 October. At that meeting the Committee should complete their preliminary look at voluntary winding up and deal with the commencement of compulsory winding up (ILRCs 12 and 30).

39. The dates for meetings after December were provisionally fixed for

Friday, 13 January 1978
Wednesday 8 February
Wednesday 8 March
Wednesday 12 April

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INSOLVENCY LAW REVIEW COMMITTEE

NOTE TO MEMBERS

1. The following papers are enclosed:-

   (a) Minutes of the Eighth Meeting,

   (b) Agenda for the Ninth Meeting, fixed for 17 October,

   (c) ILRC 42: Romalpa - a paper by Dennis Roberts, and

   (d) An article on Administration Orders by Dawn Oliver, published in the Legal Action Group Bulletin, October 1974.

2. Also enclosed to members who were unable to attend the Eighth Meeting are two papers which were issued at that meeting:

   (a) Observations on Item 4 of the agenda by Mr Muir Hunter, and

   (b) an extract of Insolvency Statistics from Trade and Industry.

Trevor Traylor

T H TRAYLOR
4 October 1977